No. 89-1344

In the Supreme Court of the United States

OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., MANAGING GENERAL PARTNER OF EP OPERATING COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, to review an order of the Federal Energy Regulatory Commission reopening, under Section 503(d) of the Act, 15 U.S.C. 3413(d), pricing determinations for 75 natural gas wells.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 887 F.2d 81. The order of the Federal Energy Regulatory Commission reopening the well determinations (Pet. App. 51a-58a) is reported at 41 F.E.R.C. ¶ 61,242. The order of the Federal Energy Regulatory Commission clarifying its initial decision and dismissing rehearing (Pet. App. 80a-86a) is reported at 42 F.E.R.C. ¶ 61,075. The related order of the Federal Energy Regulatory Commission remanding the Texas Railroad Commission's designation of the Travis Peak formation (Pet. App. 59a-79a) and

its order on rehearing (Pet. App. 87a-92a) are reported at 41 F.E.R.C. ¶ 61,213, and 42 F.E.R.C. ¶ 61,074, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. A petition for rehearing was denied on November 30, 1989. Pet. App. 93a. The petition for a writ of certiorari was filed on February 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under Section 503 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3413, the Federal Energy Regulatory Commission has authority to review and, in exceptional circumstances, to reopen state or federal agency determinations that certain categories of "high-cost" natural gas qualify for "incentive" prices under Section 107 of the NGPA, 15 U.S.C. 3317.[1] After protracted proceedings involving natural gas wells located in the Travis Peak formation, a substantial tract underlying 47 counties in northeastern Texas, FERC remanded to the Texas Railroad Commission its designation of that formation as qualifying to produce "high-cost" gas. FERC also reopened its review of the Texas Railroad Commission's related determinations for 75 natural gas wells in the formation. Petitioner, the owner of some of those wells, as well as others in the Travis Peak formation, challenged each of FERC's orders. This case involves petitioner's challenge only to FERC's order reopening the 75 well determinations.

[1] Congress has since repealed those statutory provisions, together with their price controls, effective January 1, 1993. See the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, §§ 2(b), 3(b)(5), 103 Stat. 158-159.

1. In Section 107 of the NGPA, 15 U.S.C. 3317, Congress sought to encourage the production of "high-cost" natural gas by authorizing "incentive" prices above otherwise applicable maximum lawful prices. One type of "high-cost" natural gas entitled to those higher prices was gas produced from a "tight formation."[2] Section 503 of the NGPA, 15 U.S.C. 3413, provides the framework for identifying "high-cost" gas, "tight formation" gas, and other types of natural gas eligible for NGPA incentive prices. Under that framework, the designation of a particular type of natural gas requires determinations by both FERC and the "local jurisdictional agency," which the NGPA defines as the "Federal or State agency having regulatory jurisdiction with respect to the production of natural gas," Section 503(c)(1) of the NGPA, 15 U.S.C. 3413(c)(1).

a. The local jurisdictional agency first determines the eligibility of certain types of natural gas for incentive prices. See Section 503(a) of the NGPA, 15 U.S.C. 3413(a). The Commission then reviews that determination and must take one of three courses of action within specified periods of time. First, the Commission may reverse the local agency's determination if it concludes that the determination "is not supported by substantial evidence in the record upon which

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[2] As the court of appeals explained, a "tight formation is a sedimentary layer of rock cemented together in such a manner so as to restrict or impede the flow of the gas through the rock." Pet. App. 2a n.1; see Order No. 99, 45 Fed. Reg. 56,034 (1980), FERC Stats. & Regs. (CCH) Preambles ¶ 30,183 (1980) (codified at 18 C.F.R. 271.703 (1989)), aff'd, *Pennzoil Co.* v. *FERC*, 671 F.2d 119 (5th Cir. 1982).

In recent orders, FERC has removed natural gas produced from tight formation wells spudded or recompleted after May 12, 1990, from the category of "high-cost" gas entitled to incentive prices. *Limitation on Incentive Prices for High-Cost Gas to Commodity Values*, Order No. 519, 55 Fed. Reg. 6367 (Feb. 23, 1990), reh'g denied, Order No. 519-A (Apr. 13, 1990).

such determination was made." Section 503(b)(1)(A) of the NGPA, 15 U.S.C. 3413(b)(1)(A). Second, the Commission may remand the local agency's determination if it concludes that the determination "is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made." Section 503(b)(2)(A) of the NGPA, 15 U.S.C. 3413(b)(2)(A).

Finally, if the Commission neither reverses nor remands the local agency's determination within applicable time limits (or does not expressly affirm), that determination becomes final. Pet. App. 3a-4a. Once final, the determination is "binding" unless one of two conditions identified in Section 503(d) of the NGPA, 15 U.S.C. 3413(d), is later determined to exist: (1) either the Commission or the local agency "relied on any untrue statement of a material fact," Section 503(d)(1)(A) of the NGPA, 15 U.S.C. 3413(d)(1)(A), or (2) "there was omitted a statement of material fact necessary in order to make the statements made not misleading," Section 503(d)(1)(B) of the NGPA, 15 U.S.C. 3413(d)(1)(B). Commission action taken in either of these circumstances is referred to as a "reopening." See 18 C.F.R. 275.205; Pet. App. 106a-107a.

b. Section 503 of the NGPA, 15 U.S.C. 3413, provides for judicial review of certain actions taken by FERC under this framework. Section 503(b)(4) specifically provides for review in the courts of appeals of a FERC action taken under Section 503(b)(1) or (2), namely, where the Commission reverses or remands the local jurisdictional agency's "high-cost" gas determination. Aside from those two circumstances, however, Section 503(c)(4) provides that any FERC determination made under Section 503 "shall not be subject to judicial review under any Federal or State law." See *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d 777, 782-783 (D.C. Cir. 1987), cert. denied, 484 U.S.

1025 (1988); *Mesa Petroleum Co.* v. *FERC*, 688 F.2d 1014, 1015-1016 (5th Cir. 1982).[3]

2. Petitioner, a natural gas producer, owns and operates natural gas wells in the Travis Peak formation, a substantial tract underlying 47 counties in northeastern Texas. In November 1981, the Texas Railroad Commission designated the Travis Peak formation as a "tight formation" under Section 503(a) of the NGPA, 15 U.S.C. 3413(a), and so notified FERC of its recommendation. After a series of exchanges between FERC and the state agency, FERC eventually issued a final rule in May 1986. That rule for the most part adopted the Texas Railroad Commission's recommendation and therefore designated most, but not all, of the Travis Peak formation as a "tight formation" qualified to produce "high-cost" gas. Order No. 450, 51 Fed. Reg. 19,164 (1986), FERC Stats. & Regs. (CCH) Preambles ¶ 30,698 (1986); Pet. App. 17a-27a.

Petitioner and other Travis Peak natural gas producers thereafter filed applications with the Texas Railroad Commission "to secure individual tight formation well determinations for certain Travis Peak wells already completed." Pet. App. 5a n.6. The Texas Railroad Commission approved those applications. In August 1986, the Texas Railroad Commission forwarded to FERC 75 individual notices of determination that completed Travis Peak wells qualified for higher tight formation prices. Since FERC did not reverse or remand those determinations within 45 days, as provided by Section 503(b) of the NGPA, 15 U.S.C.

[3] Section 506(a)(4) of the NGPA, 15 U.S.C. 3416(a)(4), generally provides for review of "any final order issued by the Commission * * * in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit."

3413(b), the determinations became final. See Pet. App. 5a n.6

In the meantime, Delhi Gas Pipeline Corporation, an intrastate pipeline that purchased Travis Peak natural gas, in June 1986 had filed with FERC a petition for rehearing of the May 1986 final rule designating Travis Peak as a "tight formation." Delhi contended that recent empirical studies suggested that the Texas Railroad Commission had based its initial designation on inadequate and outdated data. Pet. App. 5a-6a. In January 1987, FERC granted Delhi's petition for rehearing, vacated the May 1986 final rule, and reopened the record for further rulemaking proceedings. Order No. 450, 52 Fed. Reg. 2401 (1987), FERC Stats. & Regs. (CCH) Preambles ¶ 30,724 (1987); Pet. App. 28a-41a.

In July 1987, as a result of the District of Columbia Circuit's decision in *Williston Basin Interstate Pipeline Co.* v. *FERC*, *supra*, FERC cancelled further rulemaking proceedings.[4] At the same time, however, FERC issued a "notice of preliminary finding" to remand the designation of the Travis Peak formation as a "tight formation" to the Texas Railroad Commission for consideration of the recent Travis Peak studies. *Texas R.R. Comm'n, Travis Peak Formation*, 40 F.E.R.C. ¶ 61,100 (1987); Pet. App. 42a-50a. Petitioner, along with other Travis Peak natural gas producers, filed comments with FERC opposing the remand to the state agency.

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[4] In *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 782-783, the court of appeals held that the Commission must review "tight formation" designations under Section 503 of the NGPA, 15 U.S.C. 3413, rather than under the Commission's general rulemaking authority in Section 501 of the NGPA, 15 U.S.C. 3411.

In response to that decision, the Commission also issued a rule in July 1987 requiring review of tight formation designations only under the procedures in Section 503 of the NGPA, 15 U.S.C. 3413. See Pet. App. 6a n.7, 46a n.8.

3. On November 25, 1987, FERC issued its final order reaffirming the remand of the Travis Peak determination proceeding to the Texas Railroad Commission. *Texas R.R. Comm'n, Travis Peak Formation*, 41 F.E.R.C. ¶ 61,213 (1987); Pet. App. 59a-79a. FERC determined that under Section 503(b)(2) of the NGPA, 15 U.S.C. 3413(b)(2), the Texas Railroad Commission's "tight formation recommendation for the Travis Peak area is not consistent with information contained in the public records of [FERC], and which is not part of the record upon which the determination was made." Pet. App. 60a. Accordingly, FERC remanded "the determination * * * to [the state agency] for such further action as it deems appropriate." *Ibid.*[5]

On that same day, FERC exercised its authority under Section 503(d) of the NGPA, 15 U.S.C. 3413(d), and reopened the 75 final well category determinations previously made for the Travis Peak formation. *Texas R.R. Comm'n, Travis Peak Formation*, 41 F.E.R.C. ¶ 61,242 (1987); Pet. App. 51a-58a. In light of the parallel proceedings involving the remand to the Texas Railroad Commission, FERC determined that those well category determinations were "based on an untrue statement of fact, namely that Travis Peak is designated a tight formation, and must be reopened." Pet. App. 57a. FERC deferred all further action on those well category determinations pending the Texas Railroad Commission's reexamination of the tight formation designation for the Travis Peak formation. *Id.* at 57a-58a.[6]

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[5] In January 1988, FERC dismissed requests filed by petitioner and others for rehearing of its remand order. *Texas R.R. Comm'n, Travis Peak Formation*, 42 F.E.R.C. ¶ 61,074 (1988); Pet. App. 87a-92a.

[6] In January 1988, FERC clarified its reopening order and otherwise dismissed requests filed by petitioner and others for rehearing of that order. *Texas R.R. Comm'n, Travis Peak Formation*, 42 F.E.R.C. ¶ 61,075 (1988); Pet. App. 80a-86a. The Commission rejected peti-

4. In October 1989, the court of appeals denied the petition for review of the Commission's remand order and dismissed the petition for review of its reopening order. Pet. App. 1a-14a.[7] In the court of appeals, petitioner renewed the contention that FERC exceeded its authority under Section 503(d) by reopening the otherwise final Travis Peak well determinations. See Pet. C.A. Br. 36-44; Pet. C.A. Reply Br. 14-25. The court of appeals, however, did not reach the merits of that claim, holding that it lacked jurisdiction to review the Commission's order under the NGPA. Pet. App. 12a-13a.

The court explained that Section 503(c)(4) of the NGPA, 15 U.S.C. 3413(c)(4), governs judicial review of Section 503 well category determinations, and that Section 503(c)(4), in conjunction with Section 503(b) of the NGPA, 15 U.S.C. 3413(b), "limits judicial review of the Commission's determinations to those cases in which the Commission either reverses the determination of a jurisdictional agency or remands the matter for further consideration." Pet. App.

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tioner's claim that its order violated Section 503(d). Pet. App. 85a. As the Commission explained:

> Tight formation well category determinations are dependent upon the existence of an underlying determination that the formation in which the wells are drilled qualifies as a tight formation. Without a tight formation designation there can be no entitlement to the NGPA section 107(c) (5) [incentive] price.

Pet. App. 85a.

[7] The court of appeals rejected petitioner's challenge to FERC's order remanding, under Section 503(b)(2)(A) of the NGPA, 15 U.S.C. 3413(b)(2)(A), the Travis Peak determination proceeding to the Texas Railroad Commission. Pet. App. 9a-12a. The court concluded that FERC "pursued a reasonable and prudent course of action in remanding the tight field designation to the Texas Railroad Commission." *Id.* at 11a. Petitioner has sought no further review of that aspect of the court of appeals' judgment. See Pet. 10 n.7.

12a-13a; see p. 4, *supra*. Since the Commission's reopening order did not fall within either of those categories, the court concluded that review was unavailable.

The court of appeals rejected petitioner's assertion that it had jurisdiction under the general review provision in Section 506 of the NGPA, 15 U.S.C. 3416. See note 3, *supra*. The court observed that, under Section 503(b) of the NGPA, 15 U.S.C. 3413(b), it was "invested with appellate jurisdiction of [jurisdictional agency determinations] *only* where the Commission reverse[s] or remands them." Pet. App. 13a (quoting *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1016 (emphasis and brackets in original)). The court therefore held that jurisdiction could not lie under Section 506 where it was "clear that the drafters of the [NGPA] intended to preclude our review of section 503 orders except in the limited instances prescribed in section 503(b)." Pet. App. 13a (quoting *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1016 (brackets in original)).

ARGUMENT

The decision of the court of appeals correctly applies the judicial review provisions of the NGPA and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question whether decisions to reopen well category determinations are judicially reviewable is of limited practical significance because the Commission has only rarely exercised its authority under Section 503(d) to reopen well category determinations, and acted here only because of the "unusual and obviously protracted procedural history" of the case. Pet. App. 77a. In addition, the issue is of diminishing importance given Congress's repeal of NGPA price controls, including Section 503, effective January 1, 1993. See note 1, *supra*. Accordingly, further review of petitioner's contention regarding review of the Commission's reopening order is not warranted.

1. Petitioner renews its contention (Pet. 15-21) that Section 506 of the NGPA, 15 U.S.C. 3416—the general review provision of the NGPA—vests jurisdiction in the court of appeals over the Commission's order to reopen well category determinations under Section 503(d) of the NGPA, 15 U.S.C. 3413(d). That claim, however, errs in glossing over the pertinent review provisions for Commission orders pertaining to gas pricing determinations entered under Section 503 of the NGPA.

Section 503 of the NGPA, 15 U.S.C. 3413, by its terms provides for judicial review of only certain actions taken under that provision. Section 503(b)(4) specifically provides for review of a FERC action taken under Section 503(b)(1) or (2), namely, a decision either reversing or remanding the local jurisdictional agency's "high-cost" gas determination. Aside from those two types of orders, however, Section 503(c)(4) provides that any FERC or local agency "high-cost" gas determination initially made under Section 503(a)(1) "shall not be subject to judicial review under any Federal or State law except as provided under [Section 503(b)]," 15 U.S.C. 3413(c)(4). See *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 782-783; *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1015-1016.[8] The Commission's order here—reopening an otherwise final local agency well determination—which by its terms is neither a "reversal" nor a "remand" of that decision under Section 503(b)(1) or (2) of the NGPA, 15 U.S.C. 3413(b)(1) or (2), falls outside the appellate jurisdiction conferred by the statute.[9]

[8] For that reason, petitioner is wrong in asserting (Pet. 18-19) that a Commission reopening order under Section 503(d) is not subject to the express judicial review provisions in Sections 503(b) and 503(c)(4).

[9] A Commission order affirming a state agency's determination under Section 503 likewise falls outside the appellate jurisdiction conferred by the statute, a proposition petitioner accepts. Pet. 18; see *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1015-1016.

Petitioner therefore mistakenly relies on the "express terms" (Pet. 15) of Section 506 to provide the jurisdiction otherwise lacking in Section 503. That general review provision may not trump the specific jurisdictional provision Congress enacted for particular Commission orders, *i.e.*, orders arising out of local agency "high-cost" gas determinations under Section 503. Cf. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 n.20 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). As the District of Columbia Circuit has held, "judicial review of 'tight formation' designations is available only as provided in section 503(b)." *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 783; see *Midwest Gas Users Ass'n* v. *FERC*, 833 F.2d 341, 350 (D.C. Cir. 1987) (Section 503 "governs administrative and judicial review of local agency determinations.").[10]

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[10] Petitioner seeks to rely on the floor statement of Representative Dingell as evidence that "Section 506 was intended *only* to preclude judicial review of Commission Section 503(b) action *affirming* jurisdictional agency determinations." Pet. 20. But a full recitation of that statement—as opposed to petitioner's abbreviated version (*ibid.*)—refutes petitioner's contention and otherwise confirms the validity of the court of appeals' holding that Section 506 may not provide jurisdiction to review agency action under Section 503. As Representative Dingell stated:

> Section 506(a)(1) does not now fully reflect the separate judicial review procedures established under section 503. Section 506(a)(1) should have included a parenthetical exclusion "(other than a final finding by the Commission under section 503(b)(1))." * * * However, the conferees are confident that these modifications are not essential to the proper operation of section 506 judicial review provisions. Applying *the rule of statutory construction that the specific controls the general*, the conferees believe that the courts will properly apply these sections in a manner consistent with the explanation found on pages 118-119 of the Joint Statement of Managers. In particular the judicial review requirements of section 503(b) are intended to be distinct from the judicial review pro-

2. Petitioner also errs in contending (Pet. 11-14) that the decision of the District of Columbia Circuit in *ANR Pipeline Co.* v. *FERC*, 870 F.2d 717 (1989), conflicts with the decision below. In *ANR Pipeline Co.*, FERC decided not to exercise its Section 503(d) authority to reopen the well category determinations of the local jurisdictional agency. See 870 F.2d at 720. Thus, no question was presented in that case concerning the reviewability of an affirmative decision by FERC to reopen a well category determination under Section 503(d), and thus there was no need to apply the specific judicial review provisions of Section 503.

Indeed, in *ANR Pipeline Co.*, the court of appeals assumed—without addressing the jurisdictional issue petitioner presents here—that it had jurisdiction to review the Commission's failure to exercise its authority under Section 503(d) to reopen local agency well determinations. The court's only discussion of its jurisdiction to review the Commission's order is limited to a citation to Section 503(b) and its remark that "[i]f the Commission remands or reverses, its action is subject to judicial review." 870 F.2d at 719.

On the other hand, the courts that have addressed the claim petitioner presents here—the decision below and the court of appeals' prior decision in *Mesa Petroleum Co.* v. *FERC*, *supra*—have rejected any application of Section 506 to provide review for orders entered under Section 503. In *Mesa Petroleum Co.* v. *FERC*, *supra*, the Fifth Circuit

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visions set forth in section 506. Accordingly, section 503(c)(4) specifically provides that *judicial review of section 503 determinations is to be available only under the provisions of section 503(b).*

124 Cong. Rec. 38,367 (1978) (emphases added).

In *Mesa Petroleum Co.* v. *FERC*, *supra*, the court of appeals expressly relied on that full statement to reject the contention raised by petitioner here and therefore concluded that "the drafters of the [Natural Gas Policy] Act intended to preclude our review of § 503 orders except in the limited instances prescribed in §503(b)." 688 F.2d at 1016.

reviewed the language and "crystal clear" legislative history of Section 503 and concluded that that provision alone "invested [the court] with appellate jurisdiction of [local agency] determinations only where the Commission reverses or remands them [under Section 503(b)(1) or (2)]." 688 F.2d at 1015, 1016; accord Pet. App. 13a. As *Mesa Petroleum* noted, "[i]f all § 503 orders [were] reviewable under the general jurisdictional grant of § 506(a)(1), then § 503's provisions limiting jurisdiction [would be] meaningless." 688 F.2d at 1016. Accordingly, there is no conflict among the courts of appeals concerning the reviewability of a Commission order, under Section 503(d), reopening otherwise final local agency well determinations.

3. Despite petitioner's suggestion (Pet. 14), the practical significance of the question presented does not call for this Court's intervention. The Commission is reluctant to exercise its authority under Section 503(d) to reopen well category determinations. See, *e.g.*, *ANR Pipeline Co.* v. *FERC*, 870 F.2d 717 (D.C. Cir. 1989); *Mobil Oil Exploration & Producing Southeast Inc.*, 34 F.E.R.C. ¶ 61,211 (1986). For that reason alone, petitioner errs in claiming (Pet. 14) that the court of appeals' decision threatens to unsettle those well determinations already made final under Section 503. Here, the Commission took the extraordinary step of exercising its reopening authority under Section 503(d) only because of the "unusual and obviously protracted procedural history" of the case. Pet. App. 77a. Those circumstances, which petitioner highlighted in the court below, see Pet. C.A. Br. 26-35, are not likely to recur.[11]

[11] Indeed, in light of the Commission's recent orders, see note 2, *supra*, natural gas produced from tight formation wells spudded or recompleted after May 12, 1990, no longer qualifies for incentive prices under the NGPA.

Moreover, the procedural question at issue – as opposed to any substantive economic consequences of Commission pricing decisions under the NGPA, cf. *FERC* v. *United Distrib. Cos.*, petition for cert. pending, No. 89-1453 (filed Mar. 15, 1990), – is of diminishing importance given Congress's repeal of NGPA price controls, including Section 503, effective January 1, 1993. See note 1, *supra*. Accordingly, further review of petitioner's contention regarding review of the Commission's reopening order is not warranted.[12]

[12] In any event, the practical effect of the court of appeals' decision only postpones, rather than precludes, judicial review of the Commission's ultimate decision regarding the well determinations. FERC will not take any action on the reopened well determinations until after the Texas Railroad Commission decides, on remand, whether the Travis Peak formation should be designated again as a tight formation. See Pet. App. 57a, 84a-85a. If the state agency redesignates the Travis Peak formation, and the Commission agrees, the Commission will then reinstate the well determinations at issue. Petitioner, of course, would then have no reason to seek further review. If, on the other hand, the state agency redesignates the Travis Peak formation, and the Commission either reverses or remands that designation, the Commission's actions with respect to the well determinations would then be subject to review under Section 503(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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